

REMARKS

This communication is responsive to the Office communication dated November 22, 2010. Claims 78 and 98–115 are pending in the application. In the Office communication, the Examiner re-requested election of one of the following two species:

- 1) The bioactives of claims 102 and 103.
- 2) The means of injecting of claims 109–111.

In response, applicants respectfully request reconsideration of the election requirement, contending that the two “species” are not really species because they are not mutually exclusive. The MPEP states that “[c]laims to be restricted to different species must be mutually exclusive” (i.e., they must recite the mutually exclusive characteristics of the species). MPEP 806.0(f). The general test is that “one claim recites limitations which under the disclosure are found in a first species but not in a second, while a second claim recites limitations disclosed only for the second species and not the first.” *Id.* The alleged species do not satisfy the test for mutual exclusivity. In particular, the bioactives of species (1) can be used with any of the means of injecting of species (2), and the means of injecting of species (2) can be used with any of the bioactives of species (1). Applicants therefore contend that the election is improper. Nevertheless, pending a decision on their request for reconsideration, applicants provisionally elect species (1), the bioactives of claims 102 and 103. Applicants believe that all of the pending claims are readable on the elected species.

Applicant believes that this communication is fully responsive to the Office action. However, if the Examiner has any questions, or if a telephone interview would in any

way advance prosecution of the application, please contact the undersigned attorney of record.

Respectfully submitted,

KOLISCH HARTWELL, P.C.

/ James R. Abney /

James R. Abney
Registration No. 42,253
Customer No. 23581
520 S.W. Yamhill Street, Suite 200
Portland, Oregon 97204
Telephone: (503) 224-6655
Facsimile: (503) 295-6679
Attorney of Record

/ Margaret R. Burton /

Margaret R. Burton